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05 UNITED STATES DISTRICT COURT
06 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

07 JAY BOWLEY,) CASE NO. C07-0266-RSM
08 Plaintiff,)
09 v.) REPORT AND RECOMMENDATION
10 MICHAEL J. ASTRUE,) RE: SOCIAL SECURITY
Commissioner of Social Security,) DISABILITY APPEAL
11 Defendant.)
12 _____)

13 Plaintiff Jay Bowley proceeds through counsel in his appeal of a final decision of the
14 Commissioner of the Social Security Administration (Commissioner). The Commissioner denied
15 plaintiff's applications for Disability Insurance (DI) and Supplemental Security Income (SSI)
16 benefits after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's
17 decision, the administrative record (AR), and all memoranda of record, it is recommended that this
18 matter be REMANDED for further administrative proceedings.

19 **FACTS AND PROCEDURAL HISTORY**

20 Plaintiff was born on XXXX, 1963.¹ He graduated from high school, taking classes for
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22 ¹ Plaintiff's date of birth is redacted back to the year of birth in accordance with the
General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the

01 students with learning disorders. Plaintiff previously worked as a cable worker.

02 Plaintiff filed applications for SSI and DI benefits in September 2001, alleging disability
03 since December 4, 1998. (AR 71-73, 273-75.) His applications were denied initially and on
04 reconsideration, and he timely requested a hearing. ALJ John Bauer held a hearing on June 24,
05 2003, taking testimony from plaintiff and vocational expert Michael Swanson. (AR 494-541.)
06 ALJ Bauer issued a decision finding plaintiff not disabled on May 10, 2004. (AR 288-99.)

07 Plaintiff timely appealed to the Appeals Council, submitting additional evidence. (AR 303-
08 07.) On April 6, 2005, the Appeals Council remanded plaintiff's claims for a rehearing, noting that
09 the record did not reflect that the ALJ proffered post-hearing evidence from Carl C. Epp, Ph., to
10 plaintiff's representative. (AR 300-02.)

11 On October 3, 2005, plaintiff appeared for a supplemental hearing with ALJ Bauer. (AR
12 542-58.) ALJ Bauer issued a second decision finding plaintiff not disabled on December 1, 2005.
13 (AR 16-28.) The Appeals Council denied plaintiff's request for review on December 22, 2006
14 (AR 7-10), making the ALJ's decision the final decision of the Commissioner. Plaintiff appealed
15 this final decision of the Commissioner to this Court.

16 **JURISDICTION**

17 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

18 **DISCUSSION**

19 The Commissioner follows a five-step sequential evaluation process for determining
20 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must

21 _____
22 official policy on privacy adopted by the Judicial Conference of the United States.

01 be determined whether the claimant is gainfully employed. The ALJ found plaintiff had not
02 engaged in substantial gainful activity since his alleged onset date. At step two, it must be
03 determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff's
04 personality disorder, anxiety disorder, dysthymia, and left shoulder impairment with history of left
05 shoulder surgery severe. Step three asks whether a claimant's impairments meet or equal a listed
06 impairment. The ALJ found that plaintiff's impairments did not meet or equal the criteria for any
07 listed impairment. If a claimant's impairments do not meet or equal a listing, the Commissioner
08 must assess residual functional capacity (RFC) and determine at step four whether the claimant
09 has demonstrated an inability to perform past relevant work. The ALJ found plaintiff able to lift
10 and carry twenty pounds occasionally and ten pounds frequently, able to stand and/or walk, as well
11 as to sit with normal breaks, for a total of six hours in an eight hour day, and limited to work that
12 requires only simple, routine tasks that require only limited contact with the public and does not
13 require working on bridges or in buildings over three stories tall. With this RFC, the ALJ found
14 plaintiff unable to perform his past relevant work. If a claimant demonstrates an inability to
15 perform past relevant work, the burden shifts to the Commissioner to demonstrate at step five that
16 the claimant retains the capacity to make an adjustment to work that exists in significant levels in
17 the national economy. Considering the testimony of the vocational expert, the ALJ found plaintiff
18 capable of performing a significant number of jobs, including work as a bakery worker and
19 machine packager.

20 This Court's review of the ALJ's decision is limited to whether the decision is in
21 accordance with the law and the findings supported by substantial evidence in the record as a
22 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more

01 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable
02 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750
03 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's
04 decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.
05 2002).

06 Plaintiff argues that the vocational expert's testimony departed from the Dictionary of
07 Occupational Titles without any justification, and that the ALJ failed to evaluate the August 2000
08 opinions of treating physician Dr. Medina, erroneously evaluated the opinions of examining
09 physician Dr. Bhaskar, and failed to account for the totality of the opinions of two non-examining
10 physicians. Plaintiff further argues that the ALJ erroneously evaluated his substance use and
11 alleged onset date, and miscalculated his date last insured. He requests remand for an award of
12 benefits or, alternatively, for further administrative proceedings. The Commissioner argues that
13 the ALJ's decision is supported by substantial evidence and should be affirmed.

14 The Court has discretion to remand for further proceedings or to award benefits. *See*
15 *Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990). The Court may direct an award of benefits
16 where "the record has been fully developed and further administrative proceedings would serve
17 no useful purpose." *McCartey v. Massanari* 298 F.3d 1072, 1076 (9th Cir. 2002).

18 Such a circumstance arises when: (1) the ALJ has failed to provide legally sufficient
19 reasons for rejecting the claimant's evidence; (2) there are no outstanding issues that
20 must be resolved before a determination of disability can be made; and (3) it is clear
from the record that the ALJ would be required to find the claimant disabled if he
considered the claimant's evidence.

21 *Id.* at 1076-77. For the reasons described below, the Court recommends that this matter be
22 remanded for further administrative proceedings.

Vocational Expert's Testimony

The Dictionary of Occupational Titles (DOT) raises a rebuttable presumption as to job classification. *Johnson v. Shalala*, 60 F.3d 1428, 1435-36 (9th Cir. 1995). Pursuant to Social Security Ruling (SSR) 00-4p, an ALJ has an affirmative responsibility to inquire as to whether a vocational expert's (VE) testimony is consistent with the DOT and, if there is a conflict, determine whether the VE's explanation for such a conflict is reasonable. *Massachi v. Astrue*, 486 F.3d 1149, 1152-54 (9th Cir. 2007). As stated by the Ninth Circuit Court of Appeals: "[A]n ALJ may rely on expert testimony which contradicts the DOT, but only insofar as the record contains persuasive evidence to support the deviation." *Johnson*, 60 F.3d at 1435-36 (VE testified specifically about the characteristics of local jobs and found their characteristics to be sedentary, despite DOT classification as light work). *See also Pinto v. Massanari*, 249 F.3d 840, 847 (9th Cir. 2001) ("We merely hold that in order for an ALJ to rely on a job description in the [DOT] that fails to comport with a claimant's noted limitations, the ALJ must definitively explain this deviation.") "Evidence sufficient to permit such a deviation may be either specific findings of fact regarding the claimant's residual functionality, or inferences drawn from the context of the expert's testimony." *Light v. Social Sec. Admin.*, 119 F.3d 789, 794 (9th Cir. 1997) (internal citations omitted).

In this case, following inquiry by the ALJ, the VE testified that his testimony was consistent with the DOT. (AR 534.) However, plaintiff notes that the VE's testimony as it related to the position of machine packager was not consistent with the DOT in that the VE identified this position as exertionally "light" work, when it is, in fact, "medium" work. *See* DOT 920.685-078. There was no reasonable explanation for or persuasive evidence to support this deviation.

01 Plaintiff avers the impact of this issue on the ALJ's step five decision. That is, plaintiff
02 contends that while the ALJ ruled that the combined total of bakery worker and machine packager
03 jobs (3,300 jobs in the State of Washington and 175,000 in the national economy) constituted a
04 significant number of jobs, he never ruled that the number of bakery worker jobs alone (1,300 in
05 the State of Washington and 70,000 in the national economy) constituted a significant number.
06 He asserts that this Court may review only the ALJ's findings, not findings suggested by the
07 Commissioner. *See SEC v. Chenery*, 332 U.S. 194, 196 (1947) ("[A] reviewing court, in dealing
08 with a determination or judgment which an administrative agency alone is authorized to make,
09 must judge the propriety of such action solely by the grounds invoked by the agency. If those
10 grounds are inadequate or improper, the court is powerless to affirm the administrative action by
11 substituting what it considers to be a more adequate or proper basis.")

12 The Commissioner concedes the error identified, but asserts that it was harmless given that
13 the ALJ's step five decision did not depend on the machine packager job. He points to case law
14 supporting the conclusion that the 1,300 bakery worker jobs statewide constitutes a significant
15 number. *See Meanel v. Apfel*, 172 F.3d 1111, 1115 (9th Cir. 1999) (between 1,000 and 1,500
16 jobs in the local area constituted a significant number); *Barker v. Secretary of Health & Human*
17 *Servs.*, 882 F.2d 1474, 1478-79 (9th Cir. 1989) (1,266 jobs in the Los Angeles/Orange County
18 area constituted a significant number). The Commissioner rejects the application of *Chenery* here,
19 asserting that the ALJ did make an explicit step five finding with respect to the bakery worker job.

20 In reply, plaintiff points to a Tenth Circuit Court of Appeals decision in support of his
21 argument that this Court may not rely on the number of bakery worker jobs given the ALJ's failure
22 to specifically rely on this position at step five. *See Allen v. Barnhart*, 357 F.3d 1140 (10th Cir.

2004). In *Allen*, in considering whether a harmless error analysis could be applied where an ALJ's error at step five eliminated all but 100 jobs statewide, the court stated: "[T]o the extent a harmless-error determination rests on legal or evidentiary matters not considered by the ALJ, it risks violating the general rule against post hoc justification of administrative action recognized in [*Chenery*] and its progeny." *Id.* at 1144-45. Plaintiff also avers that the proper test for harmless error holds that, if a reasonable ALJ could determine that 1,300 jobs statewide is not a significant number, the ALJ's error must be deemed harmful. *See Stout v. Commissioner, Soc. Sec. Admin.*, 454 F.3d 1050, 1056 (9th Cir. 2006) ("[W]here the ALJ's error lies in a failure to properly discuss competent lay testimony favorable to the claimant, a reviewing court cannot consider the error harmless unless it can confidently conclude that no reasonable ALJ, when fully crediting the testimony, could have reached a different disability determination.")

The undersigned first notes that it is questionable whether *Chenery* prohibits this Court from relying on the remaining number of bakery worker jobs at step five. In *Allen*, the Tenth Circuit indicated that a harmless error analysis might be appropriate in the "right exceptional circumstance, i.e., where, based on material the ALJ did at least consider (just not properly), we could confidently say that no reasonable administrative factfinder, following the correct analysis, could have resolved the factual matter in any other way[]"; in that case, where "the number of available jobs identified by the VE [had] not been one hundred but considerably greater." 357 F.3d at 1145 (citing *Trimiar v. Sullivan*, 966 F.2d 1326, 1330-32 (10th Cir. 1992) (upholding ALJ's decision that 650 to 900 jobs statewide constituted a significant number).) The Ninth Circuit's decision in *Barker* also appears to suggest that a step five decision could be upheld following an exclusion of one or more of the job types identified by the VE and accepted by the

01 ALJ. *See* 882 F.2d at 1479 (although declining to exclude certain jobs identified, the court found,
02 even if those jobs were excluded, the remaining jobs represented significant numbers).

03 However, the Court need not decide this issue because plaintiff fails to support his
04 contention that the ALJ relied on the cumulative number of bakery worker and machine packager
05 jobs at step five. The ALJ found that there were a significant number of jobs in the national
06 economy plaintiff could perform, giving the examples of bakery worker jobs and machine packager
07 jobs. (AR 28.) He did not specifically conclude that the cumulative number of those jobs
08 constituted a significant number. As such, outside of noting that the ALJ's step five finding may
09 be implicated by the errors identified below, the Court finds no basis for questioning the ALJ's
10 step five finding with respect to the number of bakery worker jobs.

11 Physicians' Opinions

12 In general, more weight should be given to the opinion of a treating physician than to a
13 non-treating physician, and more weight to the opinion of an examining physician than to a non-
14 examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Where not contradicted
15 by another physician, a treating or examining physician's opinion may be rejected only for "clear
16 and convincing" reasons. *Id.* (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991)).
17 Where contradicted, a treating or examining physician's opinion may not be rejected without
18 "specific and legitimate reasons" supported by substantial evidence in the record for so doing."
19 *Id.* at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)).

20 As discussed below, plaintiff demonstrates reversible error with respect to treating
21 physician Dr. Medina and examining physician Dr. Bhaskar. However, the evidence does not
22 support crediting either physician's opinions as true. *See Connett v. Barnhart*, 340 F.3d 871, 876

01 (9th Cir. 2003) (remanding for further determinations where there were insufficient findings as to
02 whether plaintiff's testimony should be credited as true).

03 A. Dr. Medina

04 Plaintiff asserts that the ALJ erred in failing to address the August 2000 opinions of
05 treating physician Dr. Medina. Specifically, he points to Dr. Medina's August 4, 2000 Physical
06 Capacities Information form, in which Dr. Medina indicated that plaintiff could not climb or reach
07 above the shoulder level, could crawl only seldom, and could only occasionally bend or squat.
08 (AR 136.) He notes the omission of any such restrictions from the ALJ's hypothetical to the VE
09 (AR 531-32) and asserts that the bakery worker and machine packager positions require,
10 respectively, occasional and frequent reaching. *See* DOT 524.687-022 and 920.685-078.

11 The Commissioner first notes that plaintiff never returned to Dr. Medina following the
12 completion of the August 4, 2000 form and did not seek other treatment or complain about
13 shoulder pain since that time. The Commissioner further asserts that the omission of this evidence
14 was nonprejudicial, and therefore harmless, given that the core of plaintiff's complaints relate to
15 his mental impairments, rather than his physical impairments. *See Stout*, 454 F.3d at 1055 ("We
16 have also affirmed under the rubric of harmless error where the mistake was nonprejudicial to the
17 claimant or irrelevant to the ALJ's ultimate disability conclusion.")

18 However, as argued by plaintiff in reply, the Commissioner improperly relies on post hoc
19 rationalizations for the ALJ's failure to address this report. Further, even if it could be said that
20 plaintiff's problems were primarily mental, the ALJ must account for a combination of a claimant's
21 impairments, even those deemed not severe. *See* 42 U.S.C. § 423(d)(2)(B); 20 C.F.R. §§
22 404.1523, 416.923. Moreover, in this case, the ALJ did deem plaintiff's shoulder impairment

01 severe (AR 23) and plaintiff specifically pointed to his shoulder impairment as part of the reason
02 for his inability to work (AR 551-52). Finally, it should be noted that the ALJ relied on an August
03 2, 2000 chart note from Dr. Medina as reflecting improvement in plaintiff's shoulder pain, while
04 ignoring a form completed just two days later in which Dr. Medina assessed a limitation
05 specifically related to plaintiff's shoulder impairment. (*See* AR 18 (citing AR 137).) For these
06 reasons, the ALJ should consider Dr. Medina's August 4, 2000 form on remand and, if necessary
07 as a result of that consideration, should revisit the RFC and credibility assessments, as well as the
08 step five finding.

09 B. Dr. Bhaskar

10 Plaintiff argues that, although the ALJ endorsed the opinions of examining physician Dr.
11 Bhaskar, Dr. Bhaskar's opinions were more restrictive than that reflected in the ALJ's RFC
12 assessment. In particular, plaintiff points to the fact that Dr. Bhaskar found "limitations to
13 reaching, handling, feeling, grasping or fingering frequently or occasionally." (AR 172.) Plaintiff
14 asserts that the bakery worker and machine packager positions require, respectively, occasional
15 and frequent reaching and occasional and constant handling. *See* DOT 524.687-022 and 920.685-
16 078.

17 The Commissioner contends that that the manipulative limitations pointed to by plaintiff
18 appear to have been the result of a typographical error, asserting that Dr. Bhaskar's extensive
19 clinical findings on examination did not indicate any testing for or assessment of manipulative
20 limitations. (AR 167-72.) He also notes that Dr. Bhaskar's report reflects that plaintiff reported
21 daily activities – such as doing laundry, cleaning house, washing dishes, puttering in the garage,
22 shooting pool, and playing guitar – requiring physical and manipulative abilities. (AR 170.) The

01 Commissioner asserts that contradictions between a doctor's opinion of a claimant's abilities and
02 that doctor's notes and other recorded observations and opinions constitutes a clear and
03 convincing reason for not relying on that doctor's opinion. *See Bayliss v. Barnhart*, 427 F.3d
04 1211, 1216 (9th Cir. 2005).

05 However, again, the Commissioner inappropriately relies on post hoc rationalizations. As
06 noted by plaintiff in reply, if the ALJ, in fact, believed that these limitations were not assessed, he
07 should have contacted Dr. Bhaskar for clarification. *See* 20 C.F.R. §§ 404.1519p(b), 416.919p(b).
08 Moreover, Dr. Bhaskar's report did address plaintiff's left shoulder impairment (AR 169), which
09 could have resulted in at least the reaching limitation assessed. Indeed, the ALJ specifically
10 accepted Dr. Bhaskar's assessment as to plaintiff's limitation to lifting and carrying thirty to forty
11 pounds based on his shoulder impairment. (AR 24.) As such, the ALJ should consider these
12 possible assessed limitations on remand.

13 C. Drs. Regets and Lysak

14 Plaintiff avers that, outside of a general endorsement (*see* AR 23), the ALJ failed to
15 account for the totality of the opinions of nonexamining state agency psychologists Drs. Regets
16 and Lysak. In particular, he points to a number of moderate limitations found on their Mental
17 RFC Assessment (MRFCA) form (AR 190-92), as well as their statement that plaintiff "may
18 require some extra supervision" (AR 192). Plaintiff points to *Andrews v. Shalala*, 53 F.3d 1035,
19 1043-44 (9th Cir. 1995), as requiring an ALJ to account for all of the moderate limitations noted
20 on a nonexamining physician's MRFCA form where the ALJ endorses the views of such a source.

21 The Commissioner objects to plaintiff's reliance on the MRFCA form checkboxes and
22 asserts that the ALJ's RFC assessment is appropriately consistent with the narrative portion of the

01 form. *See* Program Operations Manual System (POMS) DI 25020.010 at B.1 (“The purpose of
02 section I . . . on the [MRFCA] is chiefly to have a worksheet to ensure that the psychiatrist or
03 psychologist has considered each of these pertinent mental activities and the claimant’s or
04 beneficiary’s degree of limitation for sustaining these activities over a normal workday and
05 workweek on an ongoing, appropriate, and independent basis. It is the narrative written by the
06 psychiatrist or psychologist in section III . . . of [the MRFCA] that adjudicators are to use as the
07 assessment of RFC.”) The Commissioner further asserts that the ALJ properly omitted any
08 reference to the tentative limitation as to extra supervision.

09 Plaintiff fails to demonstrate error with respect to Drs. Regets and Lysak. He essentially
10 concedes that, outside of the comment as to extra supervision, the ALJ’s RFC assessment was
11 consistent with the narrative portion of the MRFCA form. As argued by the Commissioner, the
12 ALJ appropriately focused on the narrative portion of that form. *See* POMS DI 25020.010 at
13 B.1.² Plaintiff’s reliance on *Andrews* is unavailing. Although the Ninth Circuit in that case did find
14 that an ALJ erred in failing to account for a number of moderate limitations assessed by a
15 testifying physician, which were consistent with the findings on another reviewing physician’s
16 MRFCA form, it did not address the significance of checkbox findings versus the narrative portion
17 of an MRFCA form. *See Andrews*, 53 F.3d at 1038-39, 1043-44. Additionally, as argued by the
18 Commissioner, the tentative nature of the comment regarding extra supervision relieved the ALJ
19 of any obligation to specifically discuss it. *See generally Vincent v. Heckler*, 739 F.2d 1393,
20 1394-95 (9th Cir. 1984) (an ALJ is not required to discuss all the evidence presented, so long as

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22 ² Although the POMS “does not have the force of law” it “is persuasive authority.” *Warre*
v. Commissioner of the Soc. Sec. Admin., 439 F.3d 1001, 1005 (9th Cir. 2006).

01 he explains why “significant probative evidence has been rejected.”) (citing *Cotter v. Harris*, 642
02 F.2d 700, 706 (3d Cir. 1981)). For these reasons, the Court finds no error in the ALJ’s
03 consideration of the MRFCFA form completed by Drs. Regets and Lysak.

04 Substance Use

05 A claimant is not entitled to disability benefits “if alcoholism or drug addiction would . .
06 . be a contributing factor material to the Commissioner’s determination that the individual is
07 disabled.” 42 U.S.C. § 423(d)(2)(C). Therefore, where relevant, an ALJ must conduct a drug
08 abuse and alcoholism (DAA) analysis and determine whether a claimant’s disabling limitations
09 remain absent the use of drugs or alcohol. 20 C.F.R. §§ 404.1535, 416.935. That is, the ALJ
10 must, first, identify disability under the five-step procedure and, second, conduct a DAA analysis
11 to determine whether substance abuse was material to disability. *Bustamante v. Massanari*, 262
12 F.3d 949, 955 (9th Cir. 2001). “If the remaining limitations would still be disabling, then the
13 claimant’s drug addiction or alcoholism is not a contributing factor material to his disability. If the
14 remaining limitations would not be disabling, then the claimant’s substance abuse is material and
15 benefits must be denied.” *Parra v. Astrue*, 481 F.3d 742, 747-48 (9th Cir. 2007).

16 Plaintiff argues that the ALJ failed to correctly address his substance use. He asserts that
17 the ALJ found his claim tainted by substance use and discounted it on that basis (*see* AR 24-25),
18 but failed to perform the two-step DAA analysis. Plaintiff further asserts that the ALJ’s findings
19 as to substance use were inconsistent, noting that while the ALJ discounted his claim of disability
20 based on substance use, he did not find plaintiff’s substance use either a medically determinable
21 impairment or severe at step two.

22 The Commissioner disputes that a DAA analysis was necessary in this case. He avers that,

01 instead, the ALJ properly considered plaintiff's potentially undisclosed substance abuse problem
02 as part of the credibility analysis. (*See* AR 25.) The Commissioner further notes that a lack of
03 truthfulness about substance use has been deemed a clear and convincing reason to reject a
04 claimant's testimony. *See Verduzco v. Apfel*, 188 F.3d 1087, 1090 (9th Cir. 1999).

05 In reply, plaintiff argues that the Commissioner's suggestion that the ALJ considered his
06 substance use only with respect to his credibility cannot be reconciled with the ALJ's endorsement
07 of the opinions of examining physician Dr. Epp. The ALJ stated with respect to Dr. Epp:

08 Dr. Epp noted that the claimant's inconsistent testing results and the claimant's lack
09 of reliable information prevented him from making a definitive diagnosis of the
10 claimant. However, Dr. Epp did note several times in his evaluation, and again in a
11 later letter, that based on his objective observations of the claimant's behavior and on
12 the objective psychological test results, there was a likely possibility that the claimant
13 had an undisclosed substance abuse problem. Because this opinion is based on the
14 doctor's objective clinical observations and on objective testing results, I give this
15 opinion significant weight.

16 (AR 24.)

17 The ALJ pointed to plaintiff's substance use in the credibility assessment, stating:

18 The claimant's general credibility regarding his mental symptoms and severity is
19 suspect. . . . The claimant also had inconsistent test results when he was tested by Dr.
20 Epp Dr. Epp stated that he suspected that the claimant was abusing alcohol, and
21 that the claimant's MMPI 2 test results supported that probability. The doctor stated
22 that substance abuse certainly could be causing the claimant's cognitive problems and
his personality problems. . . . He says that he won't take medication because he was
concerned about the effects, but he drinks alcohol regularly.

(AR 25, internal citations to record omitted.) In some circumstances, it could be appropriate for
an ALJ to discuss substance use only within the context of a claimant's credibility. However, in
this case, the ALJ accepted Dr. Epp's opinion as to a substance abuse problem and, in fact, gave
this opinion significant weight. As such, the ALJ should have assessed plaintiff's substance use

01 pursuant to the two-step method outlined in *Bustamante* and should do so on remand.

02 Alleged Onset Date and Date Last Insured

03 Plaintiff raises two other alleged errors. First, he asserts that the ALJ erroneously
04 evaluated his alleged onset date in stating that there was “no explanation as to why the claimant’s
05 disabling impairments began in 1998.” (AR 25.) Plaintiff notes that the alleged onset date –
06 December 4, 1998 – corresponds to his left-shoulder surgery on December 8, 1998 (AR 132).
07 Second, plaintiff asserts that his date last insured for DI benefits was on September 30, 2003 (AR
08 79, 93), rather than September 30, 2000, as determined by the ALJ (AR 27).

09 With respect to the first argument, the Commissioner again asserts that plaintiff’s disability
10 allegations relate primarily to his mental impairments and maintains that, consequently, the date
11 of his shoulder surgery does not fully explain his alleged onset date. He also notes that the ALJ’s
12 statement was made within the context of the credibility assessment and was one of several
13 inconsistencies or unexplained circumstances noted by the ALJ. The Commissioner does not
14 respond to plaintiff’s argument as to his date last insured.

15 As noted by the Commissioner, the ALJ made the comment regarding plaintiff’s alleged
16 onset date in his credibility assessment; he did not make a separate finding as to plaintiff’s onset
17 date. Because plaintiff does not here challenge the ALJ’s credibility assessment, the Court does
18 not consider this comment as a reversible error. However, because the ALJ’s credibility
19 assessment could be implicated and require further consideration on remand given the errors
20 outlined above, the Court does note that the ALJ’s comment regarding plaintiff’s alleged onset
21 date, if repeated, requires further explanation. That is, in making this comment, the ALJ appears
22 to have been focusing on plaintiff’s mental impairments. As noted by plaintiff, the alleged onset

01 date corresponds with his shoulder injury and surgery, which the ALJ found severe at step two and
02 which plaintiff testified served as one of the reasons for his inability to return to work (*see* AR
03 551-52).

04 Plaintiff's second argument identifies an undisputed error in the ALJ's decision. On
05 remand, the ALJ should clarify the correct date last insured for plaintiff, as documents contained
06 within the record reflect that the correct date is September 30, 2003. (AR 79, 93.)

07 **CONCLUSION**

08 For the reasons set forth above, this matter should be REMANDED for further
09 administrative proceedings.

10 DATED this 18th day of October, 2007.

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12 Mary Alice Theiler
13 United States Magistrate Judge
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